Supreme Court, U. S.
FILED
DEC 1 1977
MICHAEL RODAK, JR. CLERK

No. 76-1609

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF INDIANA, PETITIONER

v.

SCOTTSDALE MALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted pursuant to the Court's order of October 3, 1977, inviting the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 549 F. 2d 484. The opinion of the district court (Pet. App. A-17 to A-31) is reported at 418 F. Supp. 296.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1977 (Pet. App. A-13). The petition for a writ of certiorari was filed on May 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a State which has programmed a highway project for federal assistance, received federal funds for preliminary engineering, and passed through several stages of federal review and approval may avoid the requirements of the National Environmental Policy Act by withdrawing its request for federal aid and transferring to other eligible projects the federal funds it has received.

STATEMENT

This case concerns the effort of the State of Indiana to construct a highway bypassing the South Bend-Elkhart metropolitan area without satisfying the environmental impact statement (EIS) requirement of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U.S.C. 4332. The western leg of the bypass was constructed as a Federal-aid highway and completed in 1967, prior to the 1970 effective date of NEPA. The eastern leg of the bypass, not yet constructed, has been divided into three segments for planning purposes. Respondent, an Ohio partnership which owns a shopping center that would be bisected by the first segment, brought this action to enjoin construction on the ground, *inter alia*, of failure to comply with NEPA (Pet. App. A-2 to A-4).

The unconstructed segments have been planned and processed as a Federal-aid highway. They have undergone several stages of federal review. They received federal program approval pursuant to 23 U.S.C. 105 and the applicable regulations of the United States Department of Transportation (DOT); location and design hearings were conducted pursuant to the Federal-Aid Highway Act and the applicable DOT regulations; the design of the project was approved by DOT; and Indiana received $162,000 of federal funds for preliminary engineering studies (Pet. App. A-5).

In 1973, the State requested DOT's authorization to proceed with land acquisition for the first segment. When DOT informed the State that an environmental impact statement was required before further work could proceed, Indiana withdrew its request for federal funding of the first segment. DOT then advised the State that the three segments were considered one project for EIS purposes and that despite the withdrawal of the request for federal assistance for the first segment, an EIS would be required for all three segments in order for Indiana to receive federal funds for any segment (Pet. App. A-5 to A-6).

The State submitted an EIS on the last two segments for federal review. It then submitted a supplemental EIS on the first segment. DOT approved the EIS, as supplemented, on June 1, 1974 (Pet. App. A-6).

Respondent brought this action against the State, the State Highway Commission, and the Secretary of Transportation after Indiana announced its intention to proceed with land acquisition for the first segment. On January 20, 1975, the district court entered a preliminary injunction. Just prior to issuance of the injunction, DOT withdrew its approval of the EIS and required the State to prepare a new EIS for all three remaining segments (Pet. App. A-6). This decision was based on a re-examination of the EIS in which DOT determined that the EIS was procedurally defective because it had not been properly circulated for public comment as required by 42 U.S.C. 4332(2)(C). Indiana then decided to withdraw its request for federal funding for the last two segments as well as the first and to complete construction of the bypass entirely with state funds. This decision, however, did not entail any reduction in the amount of federal money received for Indiana highway projects, since the State by an accounting transfer allocated to other projects the federal funds

it had received for the preliminary engineering studies. The district court dismissed the action against the federal defendants. Subsequently, the district court dissolved the injunction and entered judgment for the State, holding that because of the withdrawal from Federal-aid participation the bypass project was no longer subject to NEPA.

The court of appeals reversed. It found that there had been "federal participation in the programming, location, design, preliminary engineering, and right of way acquisition stages," and hence it had "no difficulty in concluding on the basis of the record before us that the entire by-pass project is a 'major federal action' within the meaning of 42 U.S.C. 4332(C) [sic] and that an EIS is required for the remaining three segments" (Pet. App. A-10).

ARGUMENT

The issue presented in this case is of diminishing significance. The decision involves only this highway project and a handful of others that predate the advent of NEPA and the issuance in 1972 of the Federal Highway Administration's regulations implementing NEPA. The decision thus will not have a significant effect on the administration of either the Federal-Aid Highway Act or NEPA. Review by this Court is therefore unwarranted.

NEPA requires that an EIS be submitted for any "major Federal actions" (42 U.S.C. 4332(2)(C)). Although a Federal-aid highway project of the dimensions involved here is a major federal action when completed (see 23 C.F.R. 771.9(d)), it is not born one. It becomes one only at some point in its passage through progressive levels of federal processing, approval, and funding. See 23 C.F.R. 771.3(c). Such a project goes through stages that include, in chronological order, location approval, design

approval, and plans, specifications and estimates (PS & E) approval. The question decided by the court of appeals here, and presented for review in the Petition for Certiorari (Pet. 2), involves judicial identification of the stage at which the project becomes a major federal action and hence requires an environmental impact statement under NEPA.

For future projects and for almost all current ones, however, this question has been effectively mooted by regulations implementing NEPA that were issued by the Federal Highway Administration in 1972. These regulations (now 23 C.F.R. 771.5(b); see Pet. App. A-7, n. 6) require, in order for a highway construction project to obtain federal funding, that the environmental impact statement be submitted to the Department of Transportation, and approved by it, during the location stage and prior to selection of a particular location. In the present case, the location for the eastern leg of the bypass was selected in 1966 or 1967 (Pet. App. A-3, A-20), well before the enactment of NEPA. As the court of appeals correctly held (Pet. App. A-7, n. 6), the fact that this project predated NEPA—and, of course, the implementing regulations of the Federal Highway Administration—did not exempt it from NEPA's requirement of an environmental impact statement. The court was therefore required to identify the post-location stage at which that requirement attached to this project, and held that it did attach before Indiana decided to withdraw the project from further federal funding. In cases involving future projects and almost all other outstanding ones, however, courts will have to make no such decision, since any project whose location was approved subsequent to issuance of the 1972 regulations must have met the EIS requirement at the location stage if it seeks to qualify for federal funding.

The highway project involved in this case, whose long history predates both NEPA and the Federal Highway Administration regulations, is thus one of a vanishing breed. Since 1972, States that wish to renounce federal funding rather than file an environmental impact statement must do so prior to location approval, a stage when federal involvement is far less advanced than it was with this project. The question may arise whether a project whose federal participation is aborted at that stage is nonetheless a "major Federal action" under NEPA, but that would be a different question from the one presented here, where federal involvement continued long past location approval. Because an early EIS is now required for continued federal funding, there is no need for this Court to review the question whether the court of appeals was correct here in holding that a highway project as long involved with federal participation as this one was constituted a "major Federal action" for the purposes of NEPA.[1]

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[1]Petitioner asserts (Pet. 10) that "the Court of Appeals has created an impossible situation" because the State has withdrawn its request for federal participation and the Department of Transportation therefore "has no interest in the bypass project," and yet the environmental impact statement which the court of appeals has held to be required is a requirement of federal law and can only be administered by DOT. We see no such problem. Since the court of appeals has held this to be a "major Federal action" under NEPA, the Department of Transportation would apparently be required by that Act (42 U.S.C. 4332(2)(C)) to process and approve an environmental impact statement for the project. In any event, the Department of Transportation will undertake this responsibility if Indiana proceeds with the project.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

DOJ-1977-12